

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)	
)	MB Docket No. 04-233
Broadcast Localism)	

**REPLY COMMENTS OF
THE KENTUCKY BROADCASTERS ASSOCIATION**

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EXECUTIVE SUMMARY

The voluminous record in this proceeding confirms the continuing validity of the Commission's long-standing deregulatory policies applicable to broadcast radio and television stations. Broadcasters across the nation are demonstrating a high level of community involvement and responsiveness, attributable not only to competitive pressures and economic incentives, but to their own sense of public service as well. The absence of rigid national programming rules and standards is helping to ensure that communities throughout America enjoy the diverse and unique programs that best suit their interests and needs.

The record demonstrates, furthermore, that broadcasters are striking the right balance in providing political coverage. While several advocacy organizations urge the Commission to impose new content regulations and overhaul existing regulatory requirements to help foster political discourse, neither the facts nor the law support their arguments. The current communications environment - which includes cable, satellite, and Internet offerings in addition to broadcast and print media - already provides the vigorous forum for democratic discourse that these parties seek. Requiring broadcast stations to air additional political coverage does not serve the interests and needs of a public that overwhelmingly considers broadcast political coverage to be either "about right" or "too much."

In allocating airtime, broadcasters must be responsive to the community, not the specific interests of advocacy groups or individuals. Despite the apparent frustration of aspiring musicians or performers with what they perceive as limited access to broadcast facilities, it appears that most audience members are satisfied with the mix of formats and content being broadcast on commercial stations today. It is both a business and legal imperative for

broadcasters to be responsive to their communities. The record demonstrates that stations will support local musicians or performers when their communities do, too.

Under the *State Farm* line of cases, the Commission needs a "reasoned analysis" before it may re-regulate broadcast stations to achieve its localism policy goals. Significantly, those who urge the Commission to depart from its deregulatory policies appear unable or unwilling to offer even a cursory legal analysis to support their recommendations. Their silence should be construed as implicit concessions that their proposals to re-regulate, establish new rules or standards, or overhaul existing procedures and processes are legally untenable.

Finally, it is axiomatic that the Commission may act only pursuant to the authority that Congress has delegated to it. An agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress. Because Congress has chosen to occupy the field of license renewals, the Commission impermissibly exceeds its delegated authority if it acts to "strengthen" the license renewal process beyond that which Congress provided.

The Commission should take no further action in response to its Notice of Inquiry. The record in this proceeding demonstrates that its current deregulatory approach, which is consistent with Congress' vision and mandate, is the most efficient and expeditious approach to fostering localism and achieving public policy goals.

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The Kentucky Broadcasters Association (hereinafter "the Association"), by its undersigned attorneys, hereby submits these reply comments in response to the initial comments filed in the above-captioned proceeding.¹

To date, the Commission has compiled a voluminous record in its localism proceeding. In addition to testimony and input received at public hearings held nationwide, well over 81,500 written comments have been filed with the Commission since the July 1, 2004 release of its Notice of Inquiry ("NOI"). Although the Association was unable to review the entire record, it appears that the vast majority of commenters, including apparently thousands of individuals supporting their favorite broadcasters, urge the Commission to take no action that would change the *status quo*. Ultimately, these comments reveal that there is no localism "problem" to be fixed. While certain groups seek increased access to broadcast stations to promote their social or personal agendas, the record establishes that communities across the country are currently well-served by their local broadcast stations. The Commission's continuing reliance on market

¹ In the Matter of Broadcast Localism, *Notice of Inquiry*, MB Docket No. 04-233, FCC 04-129 (rel. July 1, 2004) (hereinafter "NOI"). The Association filed its initial comments jointly with the Arizona Broadcasters Association and the Montana Broadcasters Association.

forces to achieve its localism objectives, which is also consistent with congressional direction, is well-placed.

Discussion

1. A deregulated environment enhances broadcasters' responsiveness to their communities.

The concept of localism reflects a public policy mandate that broadcast stations provide service to and for the communities in which they operate. Though rooted historically in geographic considerations,² the concept is necessarily a flexible one. Among other things, the concept of localism must be sufficiently flexible to accommodate communities across the nation, regardless of factors such as size, location, or make-up.³

The elasticity inherent in the concept of localism makes it extraordinarily difficult to establish definitions or guidelines that can be applicable nationwide yet not extinguish a community's individuality.⁴ Further complicating the Commission's task in promoting localism are the constitutional considerations to which the Commission must be sensitive. As the Supreme Court has recognized, "balancing the various First Amendment interests involved in the broadcast media . . . is a task of great delicacy and difficulty."⁵

² See e.g., Comments of Collegiate Broadcasters, Inc. at 4 (November 1, 2004).

³ Arguably, the concept of localism must be sufficiently flexible to accommodate evolving definitions of community as well. Evolving types of community may include what appear to be thousands of supportive K-Love listeners who, although geographically dispersed, have filed e-mail comments attesting to the extent to which K-Love serves their needs and interests.

⁴ See e.g., Comments of Citadel Broadcasting Company at 1-2 (November 1, 2004) (hereinafter "Citadel") (discussing the Commission's rejection, in *Deregulation of Radio*, 84 F.C.C. 2d 968 at ¶¶ 58-68 (1981) (hereinafter *Radio Deregulation Order*), of "regulations that straight-jacket all stations into the same mold.").

⁵ *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 102, 36 L. Ed. 2d 772, 93 S. Ct. 2080 (1973).

The record demonstrates that broadcasters strive to comply with their localism obligations.⁶ To determine local needs and interests, they solicit community input using a wide variety of mechanisms; many use multiple means, including phone lines, websites, focus groups, town meetings, and community ascertainment seminars. In addition, active participation in civic, educational and charitable groups helps station executives and representatives keep their fingers on the pulse of the community. Employees of the Kentucky Network, KET, for example, are involved in over 90 different local or state organizations, including the Foundation for a Healthy Kentucky, Gear Up Kentucky, Junior Achievement of the Bluegrass, Kentucky Council for the Advancement and Support of Education, Kentucky Institute for Family Literacy, Kentucky Severe Storm Awareness Committee, Lexington Area Sports Authority Board, Louisville Main Street Association, and United Way of the Bluegrass. Programming geared to issues of local interest, emergency alerts, and public service announcements are among the many ways broadcast stations respond to the needs and interests they identify.

The record is replete with evidence that documents broadcasters' distinguished record of service to their communities. Kentucky broadcasters have a comparable record of service, as Attachment A demonstrates. The record evidence confirms that broadcast stations, which are

⁶ See generally Comments of the Alaska Broadcasters Association (November 1, 2004) (hereinafter "AL-BA"); CCBA; Citadel; Comments of Delmarva Broadcasting Company (November 1, 2004); Comments of Joint Broadcasters (November 1, 2004); Comments of Mississippi Association of Broadcasters (November 1, 2004); Comments of Named State Broadcasters Associations (November 1, 2004) (hereinafter "Named Associations"); Comments of the National Association of Broadcasters (November 1, 2004) (hereinafter "NAB"); Comments of the New Mexico Broadcasters Association at 3 (November 1, 2004) (hereinafter "NMBA"); Comments of Nexstar Broadcasting, Inc. (November 1, 2004); Comments of the North Carolina Association of Broadcasters (November 1, 2004) (including testimonials from the state's Governor and Attorney General); Washington State Association of Broadcasters (November 1, 2004) (hereinafter "WSAB").

accountable to both the Commission and the communities in which they operate, are best situated to identify community needs and desires and to respond promptly to them.

Perhaps as a result of their close ties to their communities, broadcast stations and their associations are attuned to the complexity inherent in the concept of localism. They agree that the Commission faces serious difficulties in even defining what constitutes the "local programming" that broadcasters should air to serve the needs and interests of their communities. Like the Commission, these commenters concur that many different types of programming, including that which is not specifically targeted to the local community, serves and benefits the community.⁷ Further, these commenters point out the significant extent to which the First Amendment, case law, and the Commission's own precedent constrain regulatory activity in this area.⁸

Broadcasters and broadcast associations also agree that, in evaluating a broadcast station's service to its community, the Commission should expand its focus from programming to include other efforts, such as participation in community activities and sponsorship of local activities.⁹ This expanded focus recognizes the benefit a community derives from activities such as the Crusade for Children, established in 1954 by Louisville, Kentucky's WHAS-TV and WHAS-AM. In the 50 years since its inception, this annual fundraiser has raised and distributed over \$108 million to organizations that serve special-needs children in all 120 Kentucky counties

⁷ See e.g., Comments of the Arizona Broadcasters Association *et al.* 4 (November 1, 2004) (hereinafter "AZ-BA"); Comments of Community Broadcasters Association at 4-5 (November 1, 2004) (hereinafter "CCBA"); Comments of Joint Broadcasters at 2, 6 (November 1, 2004).

⁸ See e.g., *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 651 (1994) ("[O]ur cases have recognized that Government regulation over the content of program broadcasting must be narrow, and that broadcast licensees must retain abundant discretion over programming choices.").

⁹ See e.g., Comments of AZ-BA at 3-4; Comments of Joint Broadcasters at 7-8 (November 1, 2004).

and more than 50 southern Indiana counties.¹⁰ In addition to their continued participation in established activities, stations demonstrate innovative responses to changing community needs and interests. For example, another Louisville broadcast station, WAVE-TV, joined forces with several organizations this year to organize the city's first-ever walk to promote prostate cancer awareness. The Families for Fathers Walk for Prostate Cancer, held during Father's Day weekend 2004, attracted more than 250 residents.

A broader definition of broadcaster service is particularly appropriate in light of the direct competition that broadcast stations face from other media and communications outlets, including cable systems, satellite services, and the Internet.

As broadcast stations and their associations observe, competition and market forces generate significant economic incentives that ensure broadcast stations are responsive to the needs and interests of the communities in which they operate.¹¹ The Commission, which has a long history of deregulating communications markets, clearly understands that markets both reward and punish. Those licensees that are responsive to their communities' interests and needs tend to thrive; those that disregard those interests and needs tend to fail. The record compiled to date demonstrates that, for the vast majority of broadcast stations, market forces are successful in guaranteeing that broadcasters fully comply with or even exceed their localism obligations.¹²

For these stations, new regulation to "promote" localism would be counterproductive. New

¹⁰ In 2004, the Crusade for Children raised over \$6 million, which it disbursed to 146 different organizations. *See WHAS Crusade for Children Grants Awarded*, WHAS Crusade for Children website, *available at* <http://www.whascrusade.org/modules.php?name=News&file=article&sid=270> (last visited December 28, 2004).

¹¹ *See e.g.*, Comments of AL-BA at 4; Comments of Delmarva Broadcasting Co. at 2; Comments of NMBA at 3; Comments of MAB at 5.

¹² *See supra* note 9.

regulation would both limit the ways in which a station might respond to a community's unique needs and interests and impose additional requirements and paperwork that would necessarily detract from local programming and community involvement.

The record also establishes that new regulation is not necessary to address the handful of broadcast stations that appear to be triggering public concern. A station that is non-responsive to the community in which it operates is subject to the Commission's complaint process; further, it places its license in potential jeopardy. It is undisputed that the Communications Act of 1934, as amended (the "Act") and current Commission rules and procedures vest the Commission with substantial authority to meaningfully discipline such stations on an as-needed basis. Thus, rather than re-regulate an entire industry, the more appropriate Commission response to instances of broadcaster non-responsiveness is to deal with offending stations on a case-by-case basis.

As the Commission concluded when it instituted its deregulatory policies for radio and television, market forces provide sufficient incentives for broadcasters to air community-responsive programming. The record compiled in response to the NOI demonstrates the continuing validity of those conclusions. Market incentives are operating as intended to guarantee that broadcasters serve the needs and interests of their communities.

2. Broadcasters are striking the right balance in providing political coverage.

Not surprisingly, certain commenters are dissatisfied with the results of a market-oriented regulatory approach. Contending that competition leads inexorably to a misinformed electorate, several advocacy organizations urge the Commission to impose new content regulations and overhaul existing regulatory requirements to help foster political discourse. Neither the facts nor the law support their arguments. The current communications environment, which includes but

is not confined to broadcast services, already provides the vigorous forum for democratic discourse that these parties seek.

Lamenting "[h]ypercommercialism in the media has swamped civic discourse," the Brennan Center for Justice and Consumer Federation of America *et al.* (hereinafter "BCJ/CFA") urge a major restructuring of broadcast regulatory policy.¹³ In their joint comments, CFA and the Consumers Union (hereinafter "CFA/CU") concur in the need for sweeping change, based largely on their presumption that economic incentives and market forces are inadequate to ensure diversity.¹⁴ The "major shift in broadcast policy" these parties advocate would establish as the Commission's primary regulatory goal "the widest possible empowerment of speakers."¹⁵

To achieve the diversity and empowerment they envision, BCJ/CFA and CFA/CU propose a multi-pronged restructuring of the broadcast industry premised, essentially, on the renunciation of commercial broadcasting. From these parties' perspective, the nation's long-standing broadcasting system, which is "dominated" by commercial licensees, is incapable of providing diverse local political and cultural programming and sufficient opportunities for local self-expression.¹⁶ Restructuring is necessary and appropriate, they believe, because "citizens' needs for democratic discourse should take precedence over the commercial marketplace of the mass media."¹⁷ Observing that the "empowerment of speakers . . . has little to do with the

¹³ Comments of the Brennan Center for Justice and Consumer Federation *et al.* at iv-v (November 1, 2004) (hereinafter "BCJ/CFA").

¹⁴ Comments of Consumer Federation of America and Consumers Union at 2 (November 1, 2004) (hereinafter "CFA/CU").

¹⁵ Comments of CFA/CU at 4.

¹⁶ Comments of BCJ/CFA at 20.

¹⁷ Comments of CFA/CU at 3.

economics of the commercial mass media,"¹⁸ these parties urge, *inter alia*, that licenses and spectrum be recovered from commercial broadcasters and assigned to nonprofit, independent media and that remaining commercial broadcasters be required to provide airtime and facilities to nonprofit, independent media.

The Campaign Legal Center and the Alliance for Better Campaigns (hereinafter "CLC/ABC") advocate a similar but less ambitious goal of expanding political coverage. Characterizing current political coverage as "minimal and declining," CLC/ABC recommend that the Commission establish a quantitative standard to foster and promote "political discourse."¹⁹ To further this objective, CLC/ABC request that the Commission revise a number of its rules;²⁰ they also propose an overhaul of the license renewal process, including the addition of an interim review and the establishment of "predictable and measurable standards [that] will enable the FCC to make [renewal] judgments based on more objective information."²¹

Although CFA concedes that "educated citizens today have access to much more information . . . than they did twenty-five years ago,"²² each of these parties seriously and erroneously discounts the wealth of information and avenues for discourse available to Americans today. In addition to multiple broadcast stations, daily newspapers, and magazines, citizens have access to cable systems, satellite radio and video providers, and the Internet,

¹⁸ *Id.* at 4.

¹⁹ Comments of Campaign Legal Center and Alliance for Better Campaigns at 2 (November 1, 2004) (hereinafter "CLC/ABC").

²⁰ CLC/ABC recommendations include a proposal to increase and revise disclosure requirements applicable to political advertisements and public service announcements ("PSAs") and a request that the Commission "clarify" its lowest unit charge ("LCU") regulations.

²¹ Comments of CLC/ABC at 8.

²² Comments of CFA/CU at 5.

including websites, web-logs and chat rooms.²³ These various media options provide both virtually unlimited information and meaningful opportunities for political debate and discourse. That the current state of political discussion displeases certain advocacy groups is not grounds for mandating that broadcast stations transmit even more political programming.

A majority of Americans appear pleased with the news and political coverage provided by broadcasters.²⁴ According to a 2003 study provided by the Radio-Television News Directors Association ("RTNDA"), over 70 percent of Americans believe that local television news serves "as a watchdog looking over local government."²⁵ More than seven in ten say that political news coverage on broadcast television is "good or excellent."²⁶ These numbers are not surprising. As numerous commenters observe, competitive alternatives create substantial incentives that ensure broadcasters promptly identify and respond to the needs and desires of the communities in which they operate.

While the advocacy organizations may bemoan that, during the recent elections, "a majority of the public was either misinformed or unaware of the basic planks of the presidential candidates' platforms,"²⁷ this public failing cannot be attributed to the broadcast industry, which is already offering substantial political coverage.²⁸ In fact, the record reveals that the audience

²³ See e.g., Comments of Citadel at 3; Comments of the Cromwell Group at 3 (November 1, 2004); Comments of NAB at i.

²⁴ The comments suggest a consensus that more voters turn to television than any other source for their election news. See e.g., Comments of CLC/ABC at 2; Comments of the Radio-Television News Directors Association at 3 (November 1, 2004) (hereinafter "RTNDA").

²⁵ Comments of RTNDA at 3-4; see also RTNDA Exhibit A.

²⁶ *Id.*

²⁷ Comments of CLC/ABC at 2; see also Comments of CFA/CU, Attachment B.

²⁸ Numerous commenting broadcast stations and associations detail their political coverage. See e.g., Comments of Joint Broadcasters at 3-4; Comments of the various Journal Broadcast

would prefer *less* political coverage. According to the Wirthlin Worldwide poll (released October 29, 2004), 42% of voters believe that local broadcasters provided "too much time" covering the elections.²⁹ Forty-seven percent say that local stations are providing "about the right amount" of coverage, while only 10% of voters think broadcasters are providing "too little time" covering elections.³⁰ If only one in ten audience members is interested in viewing additional political coverage, a requirement that broadcast stations air more political programming likely will drive the remaining nine away. Ultimately, local television stations can no more make their audiences watch programs (and retain information) than they can make candidates accept free air-time.³¹

3. In allocating airtime, broadcasters must be responsive to the community, not individual interests.

A second group of commenters seek to advance personal agendas, not social agendas. These parties seek access to broadcast stations for the purposes of obtaining an outlet for their material, be it artistic, religious, educational or commercial. The record demonstrates that broadcast stations will allocate air-time to this material when local communities demonstrate their interest and support in it. No public good is achieved, however, by requiring broadcast stations to air material or programs that are not responsive to community interests and lack public support.

This second group is largely comprised of professional musicians, performers, and promoters, represented by parties such as the American Federation of Television and Radio

Groups, including Journal Broadcast Group, Boise Radio Operations at 3 (November 1, 2004); Comments of WSAB at 13-15.

²⁹ See Comments of NAB at 50.

³⁰ *Id.*

Artists and the American Federation of Musicians, which filed comments jointly (hereinafter "AFTRA/AFM") and the National Academy of Recording Arts and Sciences, Inc. ("NARAS"). These parties assert that the broadcast industry is in "crisis,"³² that localism concerns are inseparable from the consolidation in media ownership,³³ and that this consolidation is driving the broadcast industry towards a "centralized, homogenized and uniform programming."³⁴ Cloaking their concerns in the mantle of localism, they contend that the only appropriate response to the resistance or obstacles they face is a regulatory fix.

Also falling within this group are various professionals and nonprofit organizations involved in the production and airing of public, educational and government ("PEG") programming. Although PEG programming is currently carried only by cable systems and by operators of open video systems ("OVS"), both the Alliance for Community Media and Alliance for Community Media - Western Region (hereinafter collectively referred to as "ACM") urge the Commission to expand PEG programming requirements to broadcast, satellite and IP-enabled media.³⁵ ACM echoes many of the concerns raised by AFTRA/AFM and NARAS, particularly with respect to media consolidation.

AFTRA/AFM and NARAS discuss the difficulty their members encounter in obtaining access to commercial broadcast facilities, but offer no evidence that audiences are in fact

³¹ See *e.g.*, Comments of NAB at 48-50, discussing and documenting political candidates' refusal of free air time; Comments of WSAB at 16.

³² Comments of American Federation of Television and Radio Artists and the American Federation of Musicians at 5 (November 1, 2004) (hereinafter "AFTRA/AFM").

³³ Comments of AFTRA/AFM at 4; Comments of National Academy of Recording Arts and Sciences, Inc. at 6-7 (November 1, 2004) (hereinafter "NARAS").

³⁴ Comments of AFTRA/AFM at 4; *see also* Comments of NARAS at 1-3.

³⁵ Comments of Alliance for Community Media at 2 (November 1, 2004) and Comments of Alliance for Community Media - Western Region at 2 (November 1, 2004) (hereinafter collectively "ACM").

interested in listening to the music that that their members have created or would support its airing.³⁶ AFTRA/AFM and NARAS merely assume that audiences listening to local commercial broadcast stations want this product (which may be "local" in some geographic capacity only, if at all). NAB, however, cites several studies that refute both this assumption and the corresponding assumption that audiences are ill-served by commercial broadcasters. Studies by the Edison Media Research and Arbitron (July 2002), the Mellman Group (December 2002), and Zogby International (October 2003) all demonstrate "solid appreciation among the American public" for the radio offerings available to them.³⁷

Despite the apparent frustration of AFTRA/AFM and NARAS members, it appears that most audience members are satisfied with the mix of formats and content being broadcast on commercial stations today. As the initial comments in this proceeding have made clear, it is a business imperative for broadcasters to be responsive to their communities; thus, if a local station's audience wants and supports programs that broadcast the work of musicians from the area, then the stations will respond.³⁸ If the audience is not interested, government fiat cannot make that audience listen - assuming *arguendo* that such fiat is even permissible under the Constitution.

³⁶ Other broadcast outlets available to local musicians and performers include public radio and television, noncommercial stations, and low power FM ("LPFM") stations. Neither AFTRA/AFM nor NARAS discuss the adequacy of these alternatives. Similarly, the United States Conference of Catholic Bishops ("USCCB") complains that broadcasters "are more interested in commercial gain than in serving their communities' interest in religious matters." Comments of USCCB at 1 (November 1, 2004). However, the flood of emails from appreciative K-LOVE listeners demonstrates that the broadcast industry, which includes commercial, non-commercial and public stations, is devising new and innovative ways to successfully address religious interests and matters.

³⁷ Comments of NAB at 56-57.

³⁸ See e.g., Comments of Joint Broadcasters at 4; Comments of NAB at 56. Further, broadcast stations recognize their duty to respond to a "strongly expressed need" by a segment of their communities of license. *Radio Deregulation Order*, *supra* note 4 at ¶ 63.

AFTRA/AFM and NARAS seek access to obtain air-play and exposure for their members. The access ACM seeks goes far beyond this. ACM would have the Commission pursue a type of third-party access which, because it is dependent on dedicated facilities and multi-channel operations, is fundamentally incompatible with broadcast media. Congress recognized this incompatibility - and the First Amendment concerns raised by access issues generally - when it enacted the PEG provisions in 1984:

One of the greatest challenges over the years in establishing communications policy has been assuring access to the electronic media by people other than the licensees or owners of those media. The development of cable television, with its abundance of channels, can provide the public and program providers the meaningful access that, up until now, has been difficult to obtain. A requirement of reasonable third-party access to cable systems will mean a wide diversity of information sources for the public - the fundamental goal of the First Amendment - without the need to regulate the content of programming provided over cable.³⁹

Since then, Congress has extended PEG requirements only to OVS operators;⁴⁰ they have never been imposed upon the broadcast industry.

4. "Reform" advocates are silent on threshold issues, including questions of legality and Commission authority.

Significantly, none of the commenters calling for regulatory change appear to address fundamental threshold issues, such as explaining how their recommendations could be accomplished pursuant to controlling law or whether, in light of specific statutory provisions, recommended Commission action would be appropriate or permissible. Their silence should be construed as implicit concessions that their proposals are legally untenable.

³⁹ H.R. Rep. No. 98-934, *reprinted in* 1984 U.S.C.C.A.N. at 4655, 4667; *see* 47 U.S.C. § 531(b).

⁴⁰ *See* 47 U.S.C. § 531(b).

AFTRA/AFM and NARAS, for example, call for regulatory reforms but, notably, neither set of comments addresses the myriad of legal and policy issues their recommendations raise. There is no discussion of the First Amendment implications of their similar proposals to quantify and regulate content nor, despite explicit Commission request, is there any discussion regarding the scope of the Commission's authority to regulate in areas such as payola-type practices and voice-tracking.⁴¹

The comments of ACM and ACM-WR are devoid of any discussion regarding the lawfulness of imposing PEG programming requirements, including funding obligations, on broadcast stations. At the very least, the ACM parties should have acknowledged that the Act imposes PEG obligations upon cable and OVS providers only.

BCJ/CFA and CFA/CU propose to "balance" the broadcast industry by, *inter alia*, denying license renewals for commercial broadcasters and handing those licenses to nonprofit, independent media. Had these parties intended their proposed restructuring of the broadcast industry as a meaningful and viable option for Commission consideration, then surely they would have attempted to explain how that restructuring - including the significantly altered public interest standard applicable to renewals upon which it would be based - could be reconciled with the Constitution and the Act, as well as decades of Commission precedent and case law. They make no such effort. Nor do they attempt to reconcile their expansive "empowerment" proposal with the Commission's long-standing recognition that "balanced programming does not necessarily require that a station attempt to provide service to all segments of the community. . . ."⁴²

⁴¹ See NOI at ¶¶ 35, 38.

⁴² NOI at ¶ 24.

CLC/ABC's comments are similarly silent with respect to the constitutional and statutory issues its proposals raise. For example, CLC/ABC chooses to sidestep the First Amendment ramifications of its proposed "quantitative standard" applicable to political discourse, even though the NOI notes the Commission's sensitivity to the First Amendment concerns inherent in any form of content regulation.⁴³ And, although CLC/ABC states that the Commission "currently has the authority to add an interim review" to the license renewal process,⁴⁴ it neither provides a supporting citation nor discusses the substantial statutory limitations on Commission discretion in this area.

As a number of commenters observed, before the Commission may depart from its former views and re-regulate in this area for the purpose of achieving its localism policy goals, it must provide a reasoned analysis, consistent with that described by the Supreme Court in *State Farm*.⁴⁵ It is noteworthy that those who urge the Commission to depart from its deregulatory policies appear unable or unwilling to assist the Commission in this task by offering even a cursory legal analysis to support their recommendations.

5. The Commission lacks authority to modify the license renewal process.

As the Commission points out, the renewal process was substantially deregulated in the 1980s, turning from active review to a more passive role based on petitions to deny and license certifications. Congress not only concurred with this approach, it further deregulated the process in 1996 when, in enacting the Telecommunications Act of 1996 (the "1996 Act"), it eliminated the comparative renewal process, extended the license renewal term to eight years, established a

⁴³ NOI at ¶ 12.

⁴⁴ Comments of CLC/ABC at 8.

⁴⁵ *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) ("*State Farm*").

presumption of renewal if a licensee has served the "public interest, convenience and necessity," and has not committed any violations of the Commission's rules, and prohibited competitor consideration.⁴⁶

It is axiomatic that the Commission may act only pursuant to the authority that Congress has delegated to it. "An agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress."⁴⁷ When Congress has chosen to occupy a field, as it has done with respect to license renewals in Section 309(k), the Commission exceeds its delegated authority if it acts to "strengthen" the process beyond that which Congress provided, as numerous parties urge and the Commission itself considers.⁴⁸ Thus, the Commission may not institute an interim review, as CLC/ABC requests, because Section 309(k) neither contemplates nor authorizes an interim review process. Settled principles of statutory construction provide, *inter alia*, that the specific prevails over the general, and the later-enacted provision prevails over the earlier-enacted provision.⁴⁹ Moreover, the Commission may not deem such action permissible because Congress did not expressly foreclose the possibility.⁵⁰

⁴⁶ 47 U.S.C. § 309(k).

⁴⁷ *Motion Picture Ass'n of America, Inc., et al. v. FCC and United States*, 27 CR 1305, 309 F.3d 796 (2002) ("MPAA ") ("The FCC cannot act in the 'public interest' if the agency does not otherwise have the authority to promulgate the regulations at issue.").

⁴⁸ NOI at ¶ 42.

⁴⁹ See e.g., *Stendor Enterprises Ltd. v. Armtex, Inc.*, 947 F.2d 727,732 (4th Cir. 1991); *Redhouse v. C.I.R.*, 728 F.2d 1249, 1253 (9th Cir. 1984); *Mesa Petroleum Co. v. FERC*, 688 F.2d 1014, 1016 (5th Cir. 1982).

⁵⁰ *Id.* The MPAA court found this to be "an entirely untenable position," citing in support a long string of cases, including *Ry. Labor Executives*, 29 F.3d at 671 ("Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with Chevron and quite likely with the Constitution as well.").

Nor may the Commission fashion and apply a new "public interest" standard, as several parties either explicitly or implicitly urge, in an attempted end-run around the deregulation Congress has mandated. Under the doctrine of ratification, when Congress uses a term such as "public interest" in Section 309(k)(1), it is presumed to intend the meaning of that term or phrase as it has been interpreted by agencies or courts.⁵¹ In implementing Section 309(k), the Commission properly adhered to this doctrine, observing that "[i]t is our present intent to continue to apply existing policy statements and case law, refining these as appropriate on a case-by-case basis, in interpreting the statutory terms that govern the new renewal process."⁵² While the Commission may clarify those terms, it may not alter their established meaning as of the date of enactment.

In clarifying the Act in this instance, the Commission is entitled to deference only if it acts in accordance with its precedent or offers a reasonable explanation for the change. Under the familiar *Chevron* two-step test, the courts will defer to the Commission unless Congress has spoken to the precise question at issue (*Chevron* step one) or the Commission's interpretation is unreasonable (*Chevron* step two).⁵³ In determining whether an agency's statutory construction is "permissible" under the second prong of *Chevron*, a court must consider whether the agency has

⁵¹ See, e.g., *Society of Plastics Indus., Inc. v. ICC*, 955 F.2d 722, 728-29 (D.C. Cir. 1992) (in interpreting the meaning of the term "joint rate" within the Interstate Commerce Act, the court set forth the doctrine of ratification which holds that "when Congress reenacts, without change, statutory terms that have been given a consistent judicial or administrative interpretation, Congress has expressed an intention to adopt that interpretation").

⁵² *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, 2 CR 1238, 11 FCC Rcd 6363, ¶ 5 (1996).

⁵³ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct 2778, 81 L Ed 2d 694 (1984).

been consistent in its interpretation of the statute.⁵⁴ The courts require that an agency square its construction of a statutory term or directive with its prior pronouncements; failure to do so, absent reasonable explanation, warrants remand or reversal.

In this case, certain commenting parties admittedly seek a "major shift" in policy as well as process but they do not offer, nor does the record contain, any reasonable basis for the substantial deviations from precedent they seek. In fact, the record documents widespread community-responsive broadcaster service and corresponding audience satisfaction, thereby supporting a continuation of the deregulatory policies instituted by the Commission two decades ago. This record, in conjunction with the deregulatory directives articulated by Congress in the 1996 Act, requires that the Commission reject the calls of those seeking to promote their own social or personal agendas and, instead, maintain its present course.

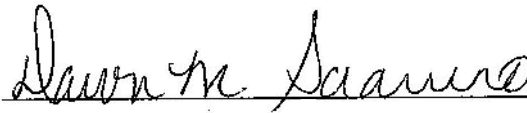
⁵⁴ *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 108 S. Ct. 413, 421, n.20, 98 L. Ed. 2d 429 (1987).

Conclusion

WHEREFORE, the Commission should take no further action in response to its Notice of Inquiry. The record in this proceeding demonstrates that its current deregulatory approach, which is consistent with Congress' vision and mandate, is sufficient to foster localism and achieve public policy goals.

Respectfully submitted,

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ATTACHMENT A
QUALITATIVE RESEARCH FINDINGS

Kentucky Public Affairs Summary

Introduction

Broadcasters have a mandate to serve the public interest of the communities in which they operate. Given the diversity of communities in the United States, there is a multitude of needs which could be and are addressed over the public airwaves by broadcasters. Indeed, broadcasters are recognizably in a very unique position – every station in the country is a local station and very much a part of the community it is licensed to serve.

Public affairs activities are an integral part of broadcast stations' community involvement. Through public affairs activities, stations help increase awareness of issues that affect their audiences. Radio and television broadcasters invest both programming and non-programming time and efforts to educate and involve their communities. Programming activities include, but are not limited to, public service announcements wherein stations donate valuable commercial time for messages alerting the public about health threats and other issues. Stations also produce public affairs programs featuring in-depth discussions of problems and remedies. In addition to these programming efforts, broadcasters initiate or are involved in many activities and community groups aimed at educating and involving their communities.

While the ways in which broadcasters are involved in their communities may seem similar, every local broadcaster's efforts are different. Public service campaigns undertaken by stations nationwide integrate on-air and off-air efforts. Additionally, since each station cannot address every need of its given community as its top priority, stations each focus on different needs, thus addressing overall the diversity of issues within a community. In any given community, the local broadcasters' unique responses and approaches to the diversity of issues is also supplemented by major national efforts.

Our state association, in partnership with the National Association of Broadcasters, conducted a survey of television and radio stations in Kentucky to determine the extent of station participation in public affairs activities. A variety of methodologies were employed to reach stations – with mail, fax, and Internet surveys sent out between January and April 2004. The response rate of Kentucky broadcasters was 54%, as 13 of the 17 commercial television stations licensed to the state (77%) are represented in the data, as are 142 of the 272 radio stations (52%).

The census revealed that Kentucky radio and television stations contributed approximately 156 million dollars worth of service to their communities during 2003. The data were collected, tabulated and analyzed by Public Opinion Strategies, an Alexandria, Virginia-based opinion research firm.

QUALITATIVE RESEARCH FINDINGS—KENTUCKY

The statistics on broadcasters' community service are impressive, but they don't tell the whole story. To get an idea of the true flavor of local broadcaster public service performed every day in Kentucky, we conducted in-depth interviews with television and radio station executives across the state. The result: lots of great stories about how different stations in different communities are devoting substantial resources—including money, airtime, staff time and more—to the unique needs of their communities and others.

The following is just a sampling of some of the stories we have collected about Kentucky broadcasters' public service activities in 2003.

Building Healthy Communities

WBIO-FM in Philpot, WXCM-FM in Whitesville, WVJS-AM in Owensboro and WKCM-AM in Hawesville played a starring role in the success of three Relay for Life events that raised more than \$60,000 for the American Cancer Society. The summer relays attracted hundreds of area residents for a full night of walking to support cancer prevention and treatment. In addition to airing promotional PSAs encouraging people to participate and form relay teams, WBIO, WXCM, WVJS and WKCM aired interviews with American Cancer Society officials and event organizers and broadcast live from the relay locations. "We don't just go on and make an announcement and that's it," said the stations' president, Bud Walters. "We do everything."

Every year, **WKYT-TV in Lexington** devotes one Sunday in April to a live telethon for Cardinal Hill Rehabilitation Hospital. WKYT personnel from the news, production and sales departments work together staffing phones, interviewing guests and encouraging viewers to call in pledges to benefit the Lexington hospital, which is a leader in providing acute physical rehabilitation services. In 2003, the telethon raised almost \$500,000.

During Father's Day weekend, **WAVE-TV in Louisville** organized the city's first-ever walk to promote prostate cancer awareness. Joining with Caritas Health Services and other local organizations, WAVE attracted more than 250 residents for the Families for Fathers Walk for Prostate Cancer. The idea behind the event was to get wives and children involved in encouraging fathers to see their doctors for a prostate exam. "We need to get men to the doctor. They're not going to go themselves, so we're having their families encourage their dads to go," explained WAVE Promotion Manager Bob Mack.

Supporting U.S. Troops

More than 500 area residents showed their support for U.S. troops at the United We Stand rally organized by **WSEK-FM, WHMJ-FM, WLLK-FM, WKEQ-AM and WSFC-AM in Somerset**. The April event on Somerset's downtown square featured a keynote speech by U.S. Rep. Hal Rogers, as well as short remarks from local elected officials. The local American Legion post provided a color guard, and the National

Anthem was sung by a Somerset high school student. On the stage as emcee for the event was the radio stations' general manager, Mike Tarter. WSEK morning host Frank Crabtree, a Vietnam veteran, led the pledge of allegiance. "It was a real community event with a real community feel to it," said Tarter.

Embracing Education and Youth

For three years, **WPTQ-FM and WKLX-FM in Bowling Green** have sponsored the Mini-Corvette Challenge to raise money for Junior Achievement programs. Held each April, the day at the races features go-carts with Corvette bodies, all of them sponsored by local businesses. In 2003, WPTQ and WKLX promoted the races on the air for weeks and broadcast the last event of the day live. The 2003 Mini-Corvette Challenge raised \$30,000 to support Junior Achievement's young-entrepreneur programs teaching youth about business and encouraging them to stay in school.

Putting Children First

The Louisville Courier Journal recently listed the Crusade for Children organized by **WHAS-TV and WHAS-AM in Louisville** as one of the community's "greatest gifts." Since its inception in 1954, the Crusade has raised more than \$100 million. Thanks to generous contributions of goods and services, the Crusade returns 100 percent of all donations to organizations that serve special-needs children in all 120 Kentucky counties and more than 50 southern Indiana counties. The annual Crusade for Children radiothon/telethon is held each year on the first full weekend in June. The 2003 Crusade collected \$6.3 million, with more than half the money coming from fire departments that staged road blocks and other events. Top beneficiaries in 2003 were Kosair Children's Hospital, the University of Louisville and Home of the Innocents.

Building Stronger Communities

For the 26th year, a foundation formed by **WLKY-TV in Louisville** called attention to outstanding volunteers in the community who have taken the time to care. A project of WLKY's Spirit of Louisville Foundation, Inc., the Bell Awards program was created to honor local citizens who are behind-the-scenes workers on behalf of community causes and often do not get the recognition that they deserve. Each year, Bell Awards are presented to up to 10 volunteers, judged by the foundation's board of trustees to have shown the true "spirit of Louisville" through unselfish, humanitarian service. The Bell Awards are presented at a banquet, which is televised live on WLKY. Each recipient also receives the Jefferson Award, presented by the American Institute for Public Service in Washington, D.C.

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Donating Time, Raising Money, and Responding to Community Needs

- Y** Using mean figures to derive a per-station total, responding Kentucky TV stations report running approximately 167 PSAs per week, with radio stations running 179. These figures combine all PSA spot times – from ten seconds or less up to 60 second PSAs. Using the reported rate charged for each of these spot lengths, these PSAs translate into a mean cumulative amount of \$1,255,488 a year per TV station responding, and \$296,608 per radio station responding.

The cumulative statewide totals based on these data show the total PSA value for Kentucky TV stations as \$21,343,296 and \$80,677,376 for radio stations.

- Y** All responding TV stations (100%) and almost all radio stations (98%) say they help charities, charitable causes or needy individuals by fund-raising or offering some other support. The mean amount raised by these TV stations was \$1,402,423, with responding radio stations reporting a mean of \$116,042. The projected cumulative amounts for this charitable giving is \$23,481,191 for TV stations and \$30,932,155 for radio stations who conducted some fundraising during the time period examined.

The charitable amount raised by responding TV stations ranged from under \$1,000 up to \$6,819,800, with a range among radio stations of \$100 to \$1,200,000.

- Y** Nearly four-in-ten responding Kentucky TV stations (38%) and three-quarters of radio stations (74%) were involved in either on-air campaigns – either through local news broadcasts, PSAs, or public affairs programming – or off-air activities to aid the victims of disasters.

As one of the results of these efforts, TV stations in the state reported raising \$96,900 and radio stations raised \$237,107 in direct contributions or pledges related to disaster relief during 2003.

- Y** PSAs also focus largely on local issues. Among responding TV stations, respondents say that an average of 51% of PSA time is devoted to local issues; the percentage of PSAs devoted to local issues among responding radio stations was 64%.

Broadcasters Addressing Important Topics

Y The following table examines some specific issues and the response by responding stations. As in previous years, broadcasters continue to devote time and resources to addressing important and relevant topics.

Each respondent was asked to respond whether their station aired PSAs, locally produced public affairs programs/segments (not including news broadcasts), or news segments on each of the following topic areas. The numbers here are the percentages of all state TV and radio stations who say they have addressed a particular topic through one of those methods:

Issue	TV			Radio		
	PSA	PA Program	News Segment	PSA	PA Program	News Segment
AIDS	62%	38%	62%	65%	39%	61%
Alcohol abuse	92%	31%	62%	91%	63%	75%
Adult educ./literacy	92%	31%	54%	93%	60%	78%
Anti-crime	92%	46%	69%	88%	61%	80%
Anti-smoking	92%	46%	69%	80%	51%	66%
Anti-violence	92%	38%	62%	82%	55%	80%
Breast cancer/other women's health	100%	31%	69%	94%	61%	82%
Children's issues	100%	54%	69%	84%	62%	76%
Drinking during pregnancy	38%	23%	46%	51%	26%	53%
Drunk driving	92%	38%	62%	91%	58%	82%
Drug use/abuse	77%	46%	85%	91%	60%	80%
Homeland security issues	69%	46%	69%	77%	40%	72%
Hunger/poverty/homelessness	85%	31%	54%	76%	48%	74%
Fund raising drives	100%	46%	46%	93%	72%	71%

Promoting Participation

- Y Fully 50% of responding radio stations and 37% of responding TV stations report airing public affairs programs of at least 30 minutes in length..
- Y The leading topics of public service campaigns by Kentucky broadcasters in 2003 included health and disease issues (such as cancer), drug and alcohol abuse issues, national charities (such as Easter Seals, Goodwill, etc.), children's charities, and poverty/hunger/homelessness issues. Some primary recipients included the American Cancer Society, Big Brothers Big Sisters, Crimestoppers, St. Jude's Children's Hospital, and United Way.

Methodology Notes

Continuing our participation on this project with the National Association of Broadcasters, a number of continued refinements were made from 2001, including the addition of issues such as anti-smoking and homeland security matters as possible topics for news segments, public affairs programming, and PSAs. Market size and revenue data for stations was linked to survey data, allowing for more precise weighting and sample procedures.